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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GARY TOPOLEWSKI,

Plaintiff and Appellant,

v.

MARCY GREEN et al.,

Defendants and Respondents.

B267938

(Los Angeles County
Super. Ct. No. BC519018)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Amy D. Hogue, Judge. Affirmed.

Jahrmarkt & Associates and John Jahrmarkt for Plaintiff and Appellant.

Maranga • Morgenstern, Robert A. Morgenstern, Ninos P. Saroukhanioff and
Dennis S. Newitt for Defendants and Respondents.

This case arises out of the allegation that Marcy Green and Julius Green (collectively the Greens) reported their tenant, Gary Topolewski (Topolewski), as a criminal threat to the police on the day he was moving out of their property. Topolewski appeals from a judgment of dismissal after the trial court sustained a demurrer without leave to amend his tort-based complaint against the Greens on theory that his various tort causes of action were barred by the absolute privilege in Civil Code section 47, subdivision (b).¹ Topolewski contends we should grant him leave to allege causes of action that avoid the bar of section 47, subdivision (b), namely malicious prosecution and breach of the express and implied terms of his lease.

We affirm the judgment.

FACTS

Topolewski's August 2013 complaint alleged causes of action for slander, libel, assault, battery, false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress and negligence. He alleged: In 2004, he leased a property in the Woodland Hills section of Los Angeles (property). The lease was set to terminate on September 1, 2012. On that date, he was still in possession of the property and trying to clear it of his belongings. The Greens called the police and falsely told them that Topolewski was a criminal threat. While he was carrying his belongings to his car, the police approached him with their guns drawn. They put Topolewski in handcuffs and questioned him. Upon determining that he was not a criminal threat, they released him from their custody.

The Greens demurred in part based on the official proceeding privilege set forth in section 47, subdivision (b).

The trial court sustained the demurrer without leave to amend.

This timely appeal followed.

¹ All further statutory references are to the Civil Code unless otherwise indicated.

DISCUSSION

When a trial court sustains a demurrer, it is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the defect in the pleading can be cured. “This abuse of discretion is reviewable on appeal ‘even in the absence of a request for leave to amend’ [citations], and even if the plaintiff does not claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend. [Citation.]” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 971.) The foregoing authority compels us to consider whether Topolewski has a reasonable possibility of amending his pleading even though he did not request leave to amend below and does not claim the trial court abused its discretion.

There are two issues: (1) do causes of action for malicious prosecution and breach of contract avoid the bar of section 47, subdivision (b), and (2) can Topolewski adequately plead such causes of action?

A call to the police to report suspected criminal activity falls within the privilege of section 47, subdivision (b). (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 359–360.) Case law, however, establishes that while the privilege bars most tort causes of action, it does not bar malicious prosecution. (*Jacob B. County of Shasta* (2007) 40 Cal.4th 948, 960; *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1502.) Moreover, the “privilege does not necessarily bar liability for breach of contract claims. Application of the privilege requires consideration of whether doing so would further the policies underlying the privilege.” (*Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267, 276.)

We turn first to the issue of malicious prosecution.

To prevail on a malicious prosecution arising out of a civil proceeding, “the plaintiff must show that [a] prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice. [Citation.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292.) “In a criminal context, the tort of malicious prosecution consists of initiating or procuring the arrest and prosecution

of another under lawful process, but from malicious motives and without probable cause, where the prosecution is terminated in favor of the accused. [Citation.]” (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 475, pp. 701-702 [citing to *Centers v. Dollar Markets* (1950) 99 Cal.App.2d 534, 540].) “One who procures a third person to institute a malicious criminal prosecution is liable, to the same extent as if he or she instituted it. The test is whether the defendant was actively instrumental in causing the prosecution. [Citations.]” (5 Witkin, *supra*, § 476, p. 702.)

Topolewski offers one sentence in his opening brief to show that he can state a cause of action for malicious prosecution. That sentence is this: “There is enough in the Complaint to show that the report to the [p]olice by [the Greens] was done with malice and without probable cause.” This argument is unavailing because it leaves out the first element, which is the existence of a prior civil action or criminal prosecution terminated in his favor. Consequently, there is no basis to allow him to amend to allege malicious prosecution.

Now we turn to the issue of contract remedies.

Topolewski argues that he can successfully sue the Greens for breach of the implied covenant of quiet enjoyment in his lease. (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 138 [“In every lease the landlord impliedly covenants that the tenant shall have quiet enjoyment and possession of the premises”]; § 1927 [a lease requires a lessor to give a lessee quiet enjoyment of the thing or property leased during the term of the lease].) He contends that the bar of section 47, subdivision (b) “would not effect [his] ability to assert this contract based claim.” But Topolewski provided no analysis of whether applying section 47, subdivision (b) here would or would not further its purposes. We deem the issue waived. “It is not our responsibility to develop an appellant’s argument.” (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

DISPOSITION

The judgment is affirmed. The Greens shall recover their costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT